Office - Supreme Court, U.S.
FILED
JUL 14 1984
ALEXANDER L. STEVAS,
CLERK

No. 82-5920

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

KEVIN MICHAEL SHEA,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Writ Of Certiorari To The Supreme Court of Louisiana

BRIEF OF PETITIONER

FRANCES BAKER JACK
HUNTER & JACK
Suite 101, Energy Square
212 Texas Street
Shreveport, LA 71101
(318) 425-0010
COURT APPOINTED COUNSEL FOR PETITIONER

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the rule first announced in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and most recently reiterated in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), that the Fifth and Fourteenth Amendments require suppression of statements made after a defendant has invoked his right to counsel during custodial interrogation, applies to Petitioner Shea's conviction which was not yet final at the time *Edwards* was decided.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL AND CODAL PROVISIONS	1
STATEMENT OF THE CASE AND PROCEDURAL HISTORY	2
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. Petitioner Shea's Statements Were Obtained In Violation Of His Fifth And Fourteenth Amendment Rights, Protection Of Which Is Further Guaranteed Under *Miranda* v. *Arizona* And Progeny.	6
II. The Decision Announced In *Edwards* v. *Arizona* Should Apply To Petitioner Shea's Conviction Which Was Not Yet Final At The Time *Edwards* Was Decided.	7
A. The criteria for determining retroactivity of prior decisions encompasses several considerations, including whether the case presently before the Court is on direct appeal or under collateral review.	7
B. The integrity of the truth-finding process is substantially enhanced by the principles reiterated in *Edwards* v. *Arizona*.	10
C. Reliance on old standards is an inappropriate consideration with respect to the retrospective application of *Edwards* v. *Arizona*.	13
D. Limited retrospective application of *Edwards* v. *Arizona* would not have a significant impact on the administration of criminal justice.	16
CONCLUSION	17

TABLE OF AUTHORITIES

CASES:	Page
Brown v. *Louisiana*, 447 U.S. 323 (1980)	8
Edwards v. *Arizona*, 451 U.S. 477 (1981)	*passim*
Fare v. *Michael C.*, 442 U.S. 707 (1979)	5, 11, 14, 15
Giacomazzi v. *State*, 633 P.2d 218 (Alk. 1981)	17
Hankerson v. *North Carolina*, 432 U.S. 233 (1977)	8
Hunt v. *State*, 632 S.W.2d 640 (Tex. App. 1982)	17
Jacks v. *Duckworth*, 651 F.2d 480 (7th Cir. 1981)	17
Johnson v. *New Jersey*, 384 U.S. 719 (1966)	10
Linkletter v. *Walker*, 381 U.S. 618 (1965)	4, 9
Mackey v. *U.S.*, 401 U.S. 667 (197__)	9
Michigan v. *Mosely*, 423 U.S. 96, N.7 (1975)	5, 13
Miranda v. *Arizona*, 384 U.S. 436 (1966)	*passim*
Oregon v. *Tyler*, 643 P.2d 379 (Ore. App. 1982)	17
People v. *Cerezo*, 635 P.2d 197 (Col. 1981)	17
People v. *Paintman*, 412 Mich. 518, 315 N.W.2d 418 (1982)	16
Piankhy v. *Cuyler*, 703 F.2d 728 (3rd Cir. 1983)	17
Rhode Island v. *Innis*, 446 U.S. 291 (1980)	5, 6, 11 14 15
Roberts v. *Russell*, 392 U.S. 293 (1968)	8
Robinson v. *Neil*, 409 U.S. 505 (1973)	7
Silva v. *Estelle*, 672 F.2d 457 (5th Cir. 1982)	17
Solem v. *Stumes*, ___ U.S. ___; 104 S.Ct. 1338 (1984)	*passim*
State v. *Brown*, 317 N.W.2d 714 (Minn. 1982)	16
State v. *Crosby*, 338 So.2d 584 (La. 1976)	2
State v. *Platt*, 637 P.2d 1073 (Ariz. App. 1982)	17
State v. *Shea*, 421 So.2d 200 (La. 1982)	1
Stovall v. *Denno*, 388 U.S. 293 (1967)	4, 8, 9, 10
U.S. v. *Bosby*, 675 F.2d 1174 (11th Cir. 1982)	17
U.S. v. *Gordon*, 655 F.2d 478 (2nd Cir. 1981)	17
U.S. v. *Hinckley*, 672 F.2d 115 (D.C. Cir. 1981)	17
U.S. v. *Johnson*, 457 U.S. 537 (1982)	9

Table of Authorities Continued

	Page
U.S. v. *Kiendria*, 663 F.2d 349 (1st Cir. 1981)	17
U.S. v. *Schooner Peggy*, 1 Cranch 103, 110; 2 Led 49, 51 (1801)	9
U.S. v. *Simko*, 662 F.2d 660 (10th Cir. 1981)	17
U.S. v. *Wellins*, 654 F.2d 550 (9th Cir. 1981)	17
CONSTITUTIONAL AND CODAL PROVISIONS:	
U.S. Constitution, Fifth Amendment	*passim*
U.S. Constitution, Fourteenth Amendment	*passim*
Louisiana Code of Criminal Procedure, Art. 922	2

OPINIONS BELOW

The opinions of the Supreme Court of Louisiana on original hearing and rehearing appear in the Joint Appendix and are reported with the following citation: *State* v. *Shea*, 421 S.2d 200 (La. 1982).

JURISDICTIONAL STATEMENT

The judgment of the Louisiana Supreme Court on rehearing was rendered on October 18, 1982. The Petition For Writ of Certiorari was filed on December 17, 1982, within the time set by Rule 20.1 of the Rules of the Supreme Court. The Petition For Writ of Certiorari was granted on April 30, 1984. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND CODAL PROVISIONS

The Fifth Amendment to the Constitution of the United States provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to twice be put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Fourteenth Amendment to the Constitution of the United States provides in Section One as follows:

> All persons born or naturalized in the United States and subject to the jursidiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the

citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Louisiana Code of Criminal Procedure, Article 922, provides in pertinent parts;

> A. Within fourteen days of rendition of the judgment of the supreme court, in term time or out, a party may apply to the supreme court for a rehearing. The court may act upon the application at any time.
>
> B. A judgment rendered by the supreme court becomes final when the delay for applying for a rehearing has expired and no application therefor has been made.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

After trial by jury in state district court in Caddo Parish, Louisiana, the Petitioner, KEVIN MICHAEL SHEA, was convicted of the offense of armed robbery (La. R.S. 14:64) (Criminal No. 111,684-A). He pled guilty to a second count of armed robbery and reserved his right to appeal the denial of his motion to suppress inculpatory statements under *State of Louisiana* v. *Crosby*, 338 So.2d 584 (La. 1976) (Criminal No. 111,684). He was sentenced to consecutive sentences of seventeen years at hard labor on the first conviction and five years imprisonment at hard labor on the second.

The Petitioner was arrested on July 2, 1979. He was taken to the Shreveport Police Station, where he was turned over to Detectives Smith and Snell for questioning. The Petitioner was read his *Miranda* rights and he signed the standard *Miranda* card. Petitioner stated that he did not want to make any statements until he saw a lawyer. The interview was terminated at that point.

The following afternoon, before Petitioner had consulted with an attorney, Detective Snell returned to the Shreveport City Jail, where he told Petitioner that he was to be transferred to the parish jail. Without inquiring of Shea whether he had spoken with an attorney and without any indication from Shea that he wanted to be re-interrogated, Snell asked him if he wanted to talk about the case. After being readvised of his rights and signing the *Miranda* rights card, Shea gave a statement in which he confessed to committing the robberies.

The two charges of armed robbery were severed for trial purposes. Prior to both scheduled trials, Petitioner filed a Motion To Suppress the confessions. (J.A. 1). Subsequently notice of intent to use the Petitioner's statements was filed by respondent (J.A. 1). At trial on Charge No. 111,684-A, held in April, 1980, the State introduced the oral confession given by the Petitioner on July 3rd. As the State sought to lay the foundation for the admissibility of the confession, the Petitioner objected to its admissibility on the grounds that there had not been compliance with *Miranda* procedures. The trial court overruled the objection, finding that the Petitioner had waived his right to counsel. (J.A. 1). Petitioner was found guilty of armed robbery at the conclusion of the trial. In December, 1980, Petitioner moved to suppress the inculpatory statements as they related to Charge No. 111,684. (J.A. 1). The motion was denied. (J.A. 1). Petitioner then withdrew his original plea and entered a plea of guilty with a reservation of his right to appeal the denial of his motion. (J.A. 1).

On appeal to the Louisiana Supreme Court, Petitioner raised the issue of the trial court's error in admitting the confession into evidence at trial and the subsequent denial of the Motion To Suppress. (J.A. 14). In its original opinion, dated January 25, 1982, that Court recognized

that there had been a violation of the standard governing police interrogation as set forth in *Edwards* v. *Arizona*, 451 U.S. 477 (1981). (J.A. 16). The Court went on to hold, however, that *Edwards*, decided on May 18, 1981, was not retroactive and, therefore, did not apply to Petitioner's statements made in July of 1979. (J.A. 18).

Petitioner applied for a rehearing with the Louisiana Supreme Court on the issue of retroactivity. The rehearing was granted. On October 18, 1982, the Court again held that *Edwards* was not retroactive. (J.A. 32). That decision became final on November 1, 1982, after the expiration of fourteen days from the issuance of the opinion. (La. Code of Criminal Procedure, Art. 922).

SUMMARY OF ARGUMENT

This case presents the question left unanswered by the Court's recent decision in *Solem* v. *Stumes*, ____ U.S. ____; 104 S.Ct. 1338 (1984). Petitioner Shea's conviction was on direct appeal to the Louisiana Supreme Court when the Court announced the decision in *Edwards* v. *Arizona*, 451 U.S. 477 (1981). In *Solem* the Court held that *Edwards* is not to be applied retroactively to cases on collateral review. Petitioner submits that for the reasons discussed herein, limited retrospective application is appropriate.

Under the criteria established for determining retroactivity and its varying degrees, *Edwards* should apply to Petitioner's conviction. *See: Stovall* v. *Denno*, 388 U.S. 293 (1967). Distinctions between the scope of collateral review and direct appeal warrant the differing degrees of retroactivity. *See: Linkletter* v. *Walker*, 381 U.S. 618 (1965). Furthermore, the principles announced in *Edwards* create an exception to the former rigid *per se* rule of *Miranda* concerning police conduct during custodial interrogation. The case does not present a classic "new

rule;" nonetheless the Court concluded in *Solem* that it did, though not a "clear break" rule. The "new rule" of *Edwards* substantially enhances the integrity of the truth-finding process because it provides an accused the utmost protection from coercive police practices. It preserves his right to counsel which is indispensable to the guarantee of one's Fifth Amendment privilege against self-incrimination. The critical role played by the attorney in a custodial environment has been discussed time and again by the Court. It is an integral ingredient in assuring accuracy and integrity in the criminal justice system.

Reliance on "old standards" is an inappropriate consideration with respect to *Edwards*. The "old standards," if properly construed under *Miranda* and progeny, required even more than that set forth in *Edwards*. Furthermore, numerous cases after *Miranda* reiterated the "clear" and "*per se*" rule of *Miranda* that once a person in custody asserts the right to counsel interrogation must cease. There was no room for doubt as to what the proper procedures were. *See: Michigan* v. *Mosely*, 423 U.S. 96 (1975); *Fare* v. *Michael C.*, 442 U.S. 707 (1979); *Rhode Island* v. *Innis*, 446 U.S. 291 (1980).

The criminal justice system and the efficient administration of it will not suffer as a result of the Court holding in this case that *Edwards* applies to Petitioner Shea's case. The number of cases that will be affected pales into insignificance when compared to the volume of cases that would have been affected by complete retroactivity rejected by the Court in *Solem* in large part for that very reason. Furthermore, numerous jurisdictions, both state and federal, have already applied *Edwards* to factual situations that arose prior to *Edwards*.

All factors considered, the Court should hold that *Edwards* applies to convictions that were not yet final in May 1981.

ARGUMENT

I. Petitioner Shea's Statements Were Obtained In Violation Of His Fifth And Fourteenth Amendment Rights, Protection Of Which Is Further Guaranteed Under *Miranda* v. *Arizona* And Progeny.

During the initial interrogation at the police station immediately after his arrest, after having been advised of his rights, including the right to remain silent and to consult an attorney, Shea told Detectives Snell and Smith that he did not wish to make a statement until he had consulted an attorney. At that point the interrogation ceased.

The next day, Detective Snell encountered Shea for the second time when he returned to the city jail to transfer Shea to the parish facility. Knowing that Shea had asserted his right to speak to an attorney and without inquiring whether the opportunity to do so had been afforded him yet, Detective Snell immediately asked Shea if he wanted to talk about the case. (J.A. 13, 30). This question, during an encounter instigated by Snell, constituted "[a] practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amount[ing] to interrogation." *Rhode Island* v. *Innis*, 446 U.S. 291, 301 (1980). Shea subsequently gave incriminating statements after being readvised of his rights and signing a waiver card.

Interrogation of a person in custody after that person has stated his intention to remain silent until he has consulted an attorney violates the Fifth and Fourteenth Amendments and the procedures designed by the Court to protect the rights afforded therein. Once a person

under custodial interrogation "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking, there can be no more questioning." *Miranda* v. *Arizona*, 384 U.S. 436, 444-445 (1966). The Fifth Amendment prohibits compelling a person to be a witness against himself and "any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." *Id*, 384 U.S. at 474. Interrogation cannot resume until an attorney is present or the suspect initiates conversation and subsequently knowingly and intelligently waives his privilege against self-incrimination and right to counsel. First announced in 1966, "later cases have not abandoned that view." *Edwards* v. *Arizona*, 451 U.S. 447, 485 (1981).

II. The Decision Announced In *Edwards* v. *Arizona* Should Apply To Petitioner Shea's Conviction Which Was Not Yet Final At The Time *Edwards* Was Decided.

A. The criteria for determining retroactivity of prior decisions encompasses several considerations, including whether the case presently before the Court is on direct appeal or under collateral review.

Retroactivity of judicial decisions is neither compelled by nor prohibited by the Federal Constitution. However, "[a]s a rule, judicial decisions apply 'retroactively.'" *Solem* v. *Stumes*, ___ U.S. ___; 104 S.Ct. 1338, 1341 (1984), quoting from *Robinson* v. *Neil*, 409 U.S. 505, 507-508 (1973). Varying degrees of retroactivity have been established as a result of the innumerable cases in which the Court has addressed the issue. New decisions may be given total retroactive application to all prior cases or limited application only to those where the judgment is not yet final, or those where the trial has not yet

begun. The criteria for determining where to draw the line in matters of criminal law are:

> (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.

Stovall v. *Denno*, 388 U.S. 293, 297 (1967).

The foremost consideration is the purpose to be served by the new rule. *Brown* v. *Louisiana*, 447 U.S. 323 (1980). Reliance on the old rule and the impact of retroactivity on the administration of justice come into play only "when the degree to which the rule enhances the integrity of the factfinding process is sufficiently small." *Hankerson* v. *North Carolina*, 432 U.S. 233, 243 (1977). Furthermore, the impact of retroactivity is not persuasive where the constitutional error at issue "presents a serious risk that the issue of guilt or innocence may not have been reliably determined." *Roberts* v. *Russell*, 392 U.S. 293, 295 (1968).

In *Solem* v. *Stumes*, ___ U.S. ___; 104 S.Ct. 1338 (1984), the Court held that *Edwards* v. *Arizona* did not apply retroactively to cases on collateral review. The question was left open as to application to cases like Shea's where the conviction was not yet final. The distinctions between the scope of the writ of habeas corpus (the avenue pursued in *Solem*) and direct appeal (Petitioner Shea's position) justify differing degrees of retroactivity, as recognized by Justice Powell in his concurring opinion in *Solem*, 104 S.Ct. at 1346-1348.

When a conviction is reviewed on habeas, one looks to the law in effect at the time of conviction. "[C]orrect application of . . . [that existing law] is all that is required to 'forc[e] trial and appellate courts . . . to toe the constitutional mark.' [*Mackey* v. *U. S.*, 401 U.S. 667 at 687.]" *Solem* v. *Stumes*, 104 S.Ct. at 1347 (J. Powell concurring). On the other hand, when reviewing a case on direct appeal one looks to the law as it exists at the time of review.

The origin of the distinction between what law controls on direct appeal as opposed to habeas proceedings dates back to *United States* v. *Schooner Peggy*, 1 Cranch 103, 110; 2 Led 49, 51 (1801), where Chief Justice Marshall, writing for the Court, stated:

> It is the general rule that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court a law intervenes and positively changes the rule which governs, the law must be obeyed or its obligation denied . . . [and] where individual rights . . . are sacrificed for national purposes . . . the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

More recently, the decision in *Linkletter* v. *Walker*, 381 U.S. 618 (1965), wherein the Court discussed *Schooner Peggy*, establishes that under Supreme Court precedent "a change in law will be given effect while a case is on direct review." *Id.* at 627.

In *United States* v. *Johnson*, 457 U.S. 537 (1982), the following statement quoted from *Stovall* v. *Denno*, 388 U.S. 293, 300 (1967) was interpreted as an indication of departure from the principles discussed above:

> . . . no distinction is justified between convictions now final . . . and convictions at various stages of trial and direct review.

457 U.S. at 546; 102 S.Ct. at 2584. Such an interpretation results only when the statement is taken out of the con-

text in which it was written. In the context in which the statement was written the distinction was found to be unjustified because of the overriding significance of reliance on old standards and the overwhelming burden on the administration of justice, as evidenced by the several qualifying words omitted when the Court in *Johnson* quoted from *Stovall:*

> We also conclude that, *for these purposes*, no distinction is justified between convictions now final, as in the instant case, and convictions at various stages of trial and direct review. We regard the factors of reliance and burden on the administration as entitled to *such overriding* significance as to make that distinction unsupportable.

388 U.S. at 300 (emphasis added). That conclusion is inapplicable to the case at bar where, as discussed in detail in subsequent sections of this brief, those factors are insignificant and inappropriate.

Edwards was decided on May 18, 1981. The original decision of the Louisiana Supreme Court on Shea's appeal was rendered on January 25, 1982 (J.A. 12), eight months after *Edwards*. The rehearing decision did not appear until October, 1982 (J.A. 26), nine months later and seventeen months after *Edwards*.

B. The integrity of the truth-finding process is substantially enhanced by the principles reiterated in *Edwards* v. *Arizona*.

"[C]onfessions are likely to be highly persuasive with a jury, and if coerced they may well be untrustworthy by their very nature." *Johnson* v. *New Jersey*, 384 U.S. 719, 729 (1966). For this reason the Court has outlined with specificity the procedures to be followed in order to avoid coerced confessions and violations of one's Fifth Amendment privilege against self-incrimination. The *Miranda*

safeguards are intended to give a suspect "an added measure of protection against coercive police practices . . ." *Rhode Island* v. *Innis*, 446 U.S. 291, 301 (1980). *Miranda* was concerned with " 'the interrogation environment created by the interplay of interrogation and custody . . .' " *Id* at 299. That concern was succinctly stated by the Court in *Miranda:*

> The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators . . .
>
> * * *
>
> If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

384 U.S. at 469, 474.

The importance of the right to be free from self-incrimination as guaranteed by the Fifth and Fourteenth Amendments is clear. And while "[t]he fact that a suspect has requested a lawyer does not mean that statements he makes in response to subsequent police questioning are likely to be inaccurate," *Solem*, 104 S.Ct. at 1342, the pivotal role of the attorney in insuring that they are not has long been recognized. His responsibility for seeing that the rights of an accused are protected and the proper procedures followed is discussed at length in *Fare* v. *Michael C.*, 442 U.S. 707 (1979). In *Fare* the lower court had extended the *Miranda* rule prohibiting reinterrogation to a situation where a juvenile had requested to speak to his probation officer. The Court reversed, reasoning that the role of an attorney for Fifth Amendment purposes is critically distinct from that of a probation officer:

> The rule in *Miranda* . . . was based on this Court's perception that the lawyer occupies *a critical position in our legal system* because of his unique ability

> to protect the Fifth Amendment rights of a client undergoing custodial interrogation. Because of this special ability of the lawyer to help the client preserve his Fifth Amendment rights once the client becomes enmeshed in the adversary process, the Court found that 'the right to have counsel present at the interrogation is *indispensable to the protection of the Fifth Amendment privilege* under the system' established by the Court. *[Miranda]* at 469; 86 S.Ct. at 1625. Moreover, the lawyer's presence helps guard against overreaching by the police and ensures that any statements actually obtained are accurately transcribed for presentation into evidence. *[Miranda]* at 470; 86 S.Ct. at 1625.

442 U.S. at 719 (emphasis added). In sum, "the assistance of counsel can mitigate the dangers of untrustworthiness . . . [and] the likelihood that the police will practice coercion is reduced . . ." *Miranda*, 384 U.S. at 470.

The integrity of the truth-finding process and assurance of accuracy of criminal trials depend upon the application of the principles enunciated in the Federal Constitution and the procedures designed by the Court to safeguard them. Those procedures were violated when Shea was reinterrogated after assertion of his right to counsel. Admission into evidence of the statements thereafter obtained constitutes grave constitutional error and violates *Miranda* and its progeny, including *Edwards*, which opinion had been handed down prior to the Louisiana Supreme Court's decision affirming Shea's conviction. Though the Court indicated in *Solem* that the relationship between *Edwards* and the truth-finding process is not close enough to warrant complete retroactivity, it is more than enough to warrant limited retrospective application to Shea's conviction.

C. Reliance on the old standards is an inappropriate consideration with respect to the retrospective application of *Edwards* v. *Arizona*.

In *Solem* v. *Stumes*, 104 S.Ct. at 1343, the Court stated that *Edwards* was "not the sort of 'clear break case that almost automatically is nonretroactive . . . nonetheless did establish a new rule.' " Petitioner respectfully submits that the decision in *Edwards* is subject to several interpretations, one of which is that the "new rule" did not create a new limitation on police conduct during interrogation. To the contrary, the "new rule" authorizes police conduct which could have been considered prohibited by a fair construction of *Miranda* and its *progeny*. The holding in *Edwards* reads as follows:

> . . . we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, *unless* the accused himself initiates further communication, exchanges or conversations with the police. (emphasis added)

451 U.S. at 484-485. Initiation by the accused *excepts* statements thereafter made by him from the rule of exclusion set forth in *Miranda* and reiterated in its progeny.

Prior to *Edwards* v. *Arizona* the rule concerning renewed custodial interrogation after assertion of the right to counsel was simple and clear as noted by the Court on numerous occasions. In *Michigan* v. *Mosely*, 423 U.S. 96, 100, N.7 (1975), the Court stated:

> The present case does not involve the procedures to be followed if the person in custody asks to consult

with a lawyer, since Mosley made no such request at any time. Those procedures are detailed in the *Miranda* opinion as follows:

> 'If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.'

In his concurring opinion in that case, Justice White pointed out that "[t]he Court showed [in *Miranda*] . . . that when it wanted to create a *per se* rule against further interrogation after assertion of a right, it knew how to do so. The Court . . . said 'if the individual states that he wants an attorney the interrogation must cease until an attorney is present.' *Miranda* v. *Arizona*, 384 U.S. at 474 (1966)." *Id.* at 109.

The Court's opinion in *Fare* v. *Michael C.*, 442 U.S. 707 (1979) begins by stating that *Miranda* "specified" that interrogation must cease after an accused expresses his intention to exercise his right to counsel. The *Miranda* safeguards are referred to repeatedly as "*per se*," and the rule established therein as "clear." *Id.* at 717, 719. Recognizing the primary role of the attorney as the protector of rights (as discussed earlier in brief), the Court stated:

> "For this reason, the Court fashioned in *Miranda* the rigid rule that an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease."

442 U.S. at 719.

The starting point of the Court's opinion in *Rhode Island* v. *Innis*, 446 U.S. at 293 goes even further than

that of *Fare*. Where *Fare* noted that the Court "specified" the standards concerning custodial interrogation, Justice Stewart in *Rhode Island* begins the majority opinion with the statement that "[i]n *Miranda* v. *Arizona* (citations omitted) the Court *held* . . ." (emphasis added). There was no doubt about the rule that interrogation must cease until an attorney is present; the concern in that case was what constituted interrogation, an issue further clarified in *Edwards*.

In *Solem* v. *Stumes* the Court concluded that because it could not be said that *Edwards* had been clearly foreshadowed, the reliance interest was compelling and complete retroactivity was inappropriate. Of critical importance to the Court's statement that "[w]e do not believe that the police can be faulted if they did not anticipate its *per se* approach," 104 S.Ct. at 1343, is the following passage from the majority opinion in *Fare* v. *Michael C.*, 442 U.S. at 718:

> Whatever the defects, if any, of this relatively rigid requirement that interrogation must cease upon the accused's request for an attorney, *Miranda's* holding has *the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation*, and of informing courts under what circumstances statements obtained during such interrogation are not admissible. (emphasis added)

Law enforcement officials were well aware, or most certainly should have been, of the restrictions upon custodial interrogation. Furthermore, the holding in *Edwards* v. *Arizona* loosened rather than tightened those restrictions by creating an exception to the former rigid rule. As Justice Stevens observed in his dissenting opinion in *Solem* v. *Stumes:*

> [t]he fact that some police departments may have failed to heed the plain language of the *Miranda*

opinion certainly is not justification for reaching the conclusion that the reconfirmation of what was said in *Miranda* should be regarded as a new constitutional rule." 104 S.Ct. at 1351.

D. Limited retrospective application of *Edwards* v. *Arizona* would not have a significant impact on the administration of criminal justice.

In rejecting total retroactivity of *Edwards* the Court in *Solem* v. *Stumes* noted the "disruptive effect" such would have on the administration of justice as one could "only guess at the number of cases where *Edwards* might make a difference . . ." 104 S.Ct. at 1345. Those factors do not apply in the case at bar because such a result would not occur where retroactivity is limited to only those cases that were pending on direct appeal, as Shea's was, in May 1981 when *Edwards* was decided. Clearly the number of cases would be greatly reduced. Furthermore, many state and federal courts when faced with the issue, both on direct appeal and habeas, had applied *Edwards* retroactively prior to the decision in *Solem*. Some of the decisions did so without discussion. Others either specifically held *Edwards* to be retroactive or found no reason to so hold because *Edwards* did not create a new rule.

In *People* v. *Paintman*, 412 Mich. 518, 315 N.W. 2d 418 (1982), the Michigan Supreme Court found that it was "unnecessary to analyze the question of retroactivity under traditional standards" because, rather than announcing a new rule, *Edwards* merely clarified and reconfirmed existing law. The Minnesota Supreme Court held that *Edwards* is to be applied retroactively for the same reason. *State* v. *Brown*. 317 N.W. 2d 714 (Minn. 1982).

The state courts of last resort in Alaska and Colorado applied *Edwards* to cases arising prior to the decision.

Giacomazzi v. *State*, 633 P.2d 218 (Alk. 1981); *People* v. *Cerezo*, 635 P.2d 197 (Col. 1981). The courts of appeal in Oregon, Texas and Arizona also applied *Edwards* to factual situations that arose prior to May 1981. *Oregon* v. *Tyler*, 643 P.2d 379 (Ore. App. 1982); *Hunt* v. *State*, 632 S.W.2d 640 (Tex. App. 1982); *State* v. *Platt*, 637 P.2d 1073 (Ariz. App. 1982).

In the following cases the federal courts of appeal have given *Edwards* retrospective application without discussion of the issue: *U.S.* v. *Hinckley*, 672 F.2d 115 (D.C. Cir. 1981); *U.S.* v. *Kiendra*, 663 F.2d 349 (1st Cir. 1981); *U.S.* v. *Gordon*, 655 F.2d 478 (2nd Cir. 1981); *Piankhy* v. *Cuyler*, 703 F.2d 728 (3rd Cir. 1983); *Silva* v. *Estelle*, 672 F.2d, 457 (5th Cir. 1982); *Jacks* v. *Duckworth*, 651 F.2d 480 (7th Cir. 1981); *U.S.* v. *Wellins*, 654 F.2d 550 (9th Cir. 1981); *U.S.* v. *Simko*, 662 F.2d 660 (10th Cir. 1981); and *U.S.* v. *Bosby*, 675 F.2d 1174 (11th Cir. 1982).

In light of the numerous decisions already applying, at the least, limited retrospective application of *Edwards*, for the Court to so hold in this case would affect the criminal justice system only minimally.

CONCLUSION

The Court should hold that *Edwards* v. *Arizona* applies to Petitioner's conviction which was not yet final at the time *Edwards* was decided and reverse the judgment of the Louisiana Supreme Court.

Respectfully submitted,

FRANCES BAKER JACK
HUNTER & JACK
Suite 101, Energy Square
212 Texas Street
Shreveport, LA 71101
(318) 425-0010